

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

XXX 5 1990

MEMORANDUM

SUBJECT: Inclusion of CERCLA Section 103(a) Counts in Asbestos NESHAP Cases

FROM: Michael S. Alushin (SIGNATURE)

Associate Enforcement Counsel
for Air

Glenn L. Unterberger (SIGNATURE)

Associate Enforcement Counsel
for Superfund

TO: Regional Counsels
Regions I-X

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires notification to the National Response Center immediately following the release of a hazardous substance in an amount that exceeds its reportable quantity. 42 U.S.C. § 9603. Asbestos is a CERCLA hazardous substance. 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4. Accordingly, we encourage regions to review asbestos NESHAP referrals for -determination of whether CERCLA causes of action also exist. The purpose of this memorandum is to assist that effort by identifying the elements necessary to establish a CERCLA Section 103(a) claim and providing a legal analysis of relevant statutes and regulations. In addition, this memorandum discusses criteria for selecting cases to add CERCLA counts and suggests a \$15,000 minimum settlement penalty amount for each violation.¹

We recommend that CERCLA Section 103(a) violations be alleged when prima facie evidence exists.²

II. ELEMENTS FOR A SECTION 103(a) CLAIM

Pursuant to Section 103(a) of CERCLA, a person in charge of a facility is required to notify the National Response Center as soon as he or she has knowledge of a release of a hazardous substance from such facility in an amount equal to or greater than the reportable quantity for that substance. The failure to report the release subjects the non-reporting party to judicial or administrative proceedings and penalties of up to \$25,000 per day of the violation. 42 U.S.C. § 9609(a),(b) and (c). Penalties of up to \$75,000 per day may be imposed in the case of a second violation. Id.³

Thus, in order to prevail on a CERCLA Section 103(a) count the United States must establish that a) the defendant is a person; b) the defendant was in charge of a facility from which there was a release of a hazardous substance; c) the quantity of the substance released was equal to or exceeded the reportable quantity for that substance; and d) the defendant did not notify the National Response Center as soon as it had knowledge of the release. The CERCLA definitions of key terms follow next.

A. Defined Terms.

1. Person -- the term includes individuals, firms, corporations, associations and other entities, such as federal, state and local government units. 42 U.S.C. § 9601(9).

2. Facility -- the term includes any building, structure, installation, impoundment, landfill or site where a hazardous substance is located. 42 U.S.C. § 9601(9).

3. Release -- the term covers virtually any contact with the environment, including any spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, leaching, dumping or disposing into the environment. The term also includes the abandonment or discarding of barrels or other closed receptacles that contain hazardous substances. Expressly excluded from the definition of release is any release which results in exposure to persons solely within a workplace. 42 U.S.C. § 9601(22).

4. Environment -- the term includes navigable waters, ocean waters, surface waters, the drinking water supply, groundwater, land surface or subsurface strata, or ambient air. 42 U.S.C. §9601(8). The preamble to the reportable quantity regulations makes clear that the notification requirements do not apply to releases within wholly enclosed structures. 50 Fed. Reg. 13456, 13462 (April 4, 1985). Several court rulings further indicate that a building interior is not the "environment" for CERCLA purposes. Covalt v. Carey Canada Inc., 860 F.2d 1434 (7th Cir. 1988); First United Methodist Church of Hyattsville v. United States Gypsum Co., No. JH-88-2030, slip op. at 11 (D.Md. Oct. 13, 1988). However, a release "into the environment" occurs if the discharge remains on grounds controlled by the facility owner or operator. 50 Fed. Reg. at 13462.

5. Hazardous Substance -- the term is defined to incorporate substances and chemicals regulated under environmental statutes other than CERCLA, including the Clean Air Act. 42 U.S.C. § 9601(14). As noted before, asbestos is a CERCLA hazardous substance. Id.; 40 C.F.R. § 302.4

6. Reportable Quantity -- the reportable quantity for asbestos is one pound. 40 C.F.R. § 302.4. Importantly, the reportable quantity is limited to the friable form of the mineral. Id. Even though CERCLA regulations do not define the term "friable asbestos," the reportable quantity should not be interpreted to include one pound of "any material containing more than 1 percent asbestos by weight that hand pressure can crumble..." 40 C.F.R. § 61.141 (definition of friable asbestos under Clean Air Act). Because the reportable quantity is restricted to the hazardous substance component of a solution or mixture, 40 C.F.R. § 302.6, one or more pounds of pure friable asbestos must be released for Section 103(a) to apply. Liability is further conditioned on the release of the reportable quantity within one twenty-four hour period. 40 C.F.R. § 302.6.

B. Undefined Terms.

As indicated, CERCLA provides definitions for most of the pertinent-Section 103(a) terms. Neither the statute nor the regulations, however, give meaning to the phrase "in charge...of [a] facility."⁴ For the purpose of alleging CERCLA violations in asbestos NESHAP cases, it may be assumed generally that the "owners" and "operators" liable for asbestos NESHAP violations are similarly liable for violations of Section 103(a). A person "in charge" of the facility could fairly be construed as the one who "owns, leases, operates, controls, or supervises" the demolition operation. 40 C.F.R. § 61.02 (NESHAP definition for owner or operator). Moreover, one court has ruled that the reporting requirements extend to any person able to discover, prevent and abate the release of a hazardous substance. United States v. Carr, 880 F.2d 1550 (2nd. Cir. 1989).

Although Section 103(a) liability requires that a person have "knowledge of any release...of any hazardous substance," CERCLA does not define the knowledge requirement. Case law interpreting provisions of other environmental statutes may provide guidance.

In United States v. Hayes Intern Corp., 786 F.2d 1499 (11th Cir. 1986), the Eleventh Circuit Court of Appeals considered the meaning of "knowingly" in Section 3008(d) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d) (RCRA), which authorizes criminal sanctions for "[a]ny person who knowingly transports... any hazardous waste... to a facility that does not have a permit...." The Hayes Court rejected the defendant's defenses that it was ignorant of the permit requirement and the RCRA hazardous waste status of the material transported. Id. at 1503. The court concluded that the United States met its burden of proof by demonstrating that a) the defendant knew what the waste was (in that case, a mixture of paint and solvent) and b) the defendant knew that the disposal facility was not permitted.

Id. at 1505. The court further noted that the United States may prove knowledge with circumstantial evidence. Id.

To the extent an analogy can be drawn between the RCRA definition of "knowingly" and the CERCLA definition of "knowledge," application of Hayes suggests the following conclusions: First, liability attaches notwithstanding the defendant's failure to know of the reporting requirements or failure to know that asbestos is a CERCLA hazardous substance. Second, the United States must establish that the defendant knew or should have known of the release and that the material was asbestos. Third, the United States' burden of proving "knowledge of any release" should be less than the burden imposed in the Hayes case. As a general proposition, the burden of proof in a civil case is less than the burden of proof in a criminal case. Because the Hayes Court interpreted RCRA Section 3008(d) (a criminal provision), the United States' burden

of proof under CERCLA Section 103(a) (a civil provision) should therefore entail a lower standard than required in Hayes.

C. Exempted Releases.

It is important to note that discharges in accordance with federal permits are exempt from the CERCLA reporting requirements. 42 U.S.C. §§ 9601(10) and 9603(a). Also exempt are continuous releases which are stable in size and quantity. 42 U.S.C. § 9603(f). Neither of these two exemptions or any other CERCLA Section 103 exemptions apply to asbestos NESHAP renovation and demolition cases. This memorandum thus addresses criteria for including CERCLA counts.

III. CRITERIA FOR INCLUSION OF CERCLA SECTION 103(a) COUNTS IN ASBESTOS NESHAP CASES

As stated previously, the CERCLA definition of release includes any "dumping, or disposing into the environment" and the abandonment or discarding of barrels...or other closed receptacles containing hazardous substances...." 42 U.S.C. § 9601(22). Consequently, particular attention should be paid to cases that allege violations of the asbestos disposal requirements. See 40 C.F.R. §§ 61.151(a) and 61.156.

A Section 103(a) claim may be particularly appropriate if the evidence indicates that a) asbestos waste material remained on site after the completion of the demolition in violation of 40 C.F.R. §§ 61.152(a) and 61.156 or b) asbestos waste was transported to or deposited at a location not qualified as an "active waste disposal site" within the meaning of 40 C.F.R. § 61.156. Assuming, for example, that the waste material weighed at least ten pounds, the reportable quantity is satisfied provided the waste consisted of ten percent friable asbestos. Moreover, if a large quantity of asbestos was present, there is circumstantial evidence that the release occurred within one twenty-four hour period. Liability may arise even if the asbestos was stored in sealed containers; the definition of release covers the abandonment of receptacles.

CERCLA claims should not be limited to cases that involve conduct prohibited by the asbestos NESHAP disposal provisions. Because of the unique circumstances of each referral, the question whether to allege a Section 103(a) violation must be decided on a case-by-case basis. Given the prospect of obtaining significant penalties and further deterring violations, we encourage adding CERCLA counts when prima facie Section 103(a) evidence exists. Also, we presently recommend a bottom line settlement figure of \$15,000 for each Section 103(a) violation. The proposed figure is consistent with the Clean Air Act Civil Penalty Policy provision that sets the minimum penalty amount for reporting violations at \$15,000. When the CERCLA Section 103 penalty policy becomes effective, regions should calculate settlement penalties in accordance with that guidance.

Finally, we note that a number of criminal indictments have charged violations of the CERCLA reporting requirements. United States v. Charles A. Donohoo, Jr., Cr. 89-00057, W.D.Ky.; United States v. Cuyahoga Wrecking Co., Cr. 88-497, C.D. Cal; United States v. DAR Construction, Inc., Cr. 88-65, S.D.N.Y.; United States v. Fineman, Boone and D'Avocato, Cr.

88-543, E.D.Pa. In each of these asbestos NESHAP cases, violations of 40 C.F.R. § 61.152(a) gave rise to the CERCLA Section 103 counts. In all cases litigated to judgment, the defendants pled guilty or were acquitted on the CERCLA charges. Attached for your information is a copy of an indictment.

If you have any questions about this memorandum, please call Karen Schapiro of the Air Enforcement Division (FTS 382-6240).

Attachment

cc: Regional Counsel Air and Superfund Branch Chiefs

Regions I-X

Air Compliance Branch Chiefs

Regions I-X

NESHAP Regional Counsel Contacts

Regions I-X

NESHAP Regional Coordinator

Regions I-X

AED Attorneys

John Seitz, Director

Stationary Source Compliance Division

Omayra Salgado

Stationary Source Compliance Division

Bruce Diamond, Director

Office of Waste Programs Enforcement

Scott Fulton, Director

Office of Civil Enforcement

Paul Thomson, Director
Office of Criminal Enforcement

David Buente
Chief, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA INDICTMENT

NO. CR89-00057-01-L(T) (18 U.S.C. § 11001; 42 U.S.C. §§ 7412© & (e), 7413© AND 9603(b))

vs .

CHARLES A. DONAHOO, JR.

D/B/A CHARLIE WRECKING CERTIFIED

U.S. District Court Louisville, Ky. Date: 1/19/89 by:(signature) Deputy Clerk

The Grand Jury charges:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

1. Defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, was engaged in the business of wrecking and demolition in Jefferson County, Kentucky.
2. Defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, contracted with Tuscarora Plastics, 816 South Eleventh Street, to demolish and wreck a building on Tuscarora Plastics property, 831 South Twelfth Street, Louisville, Kentucky. The building, or facility, to be demolished contained at least 260 linear feet of friable asbestos materials on pipes or 160 square feet on other facility components. Friable asbestos materials means any material containing more than one percent asbestos by weight that hand pressure can crumble, pulverize or reduce to powder when dry. The materials are adequately wetted when sufficiently mixed or united with water or an aqueous solution to prevent dust emissions. Title 42, United States Code, Section 7412. 40 C.F.R. Section 61.141. Asbestos was formerly used as insulation material for pipes, tanks, ducts, walls, and other structural components of buildings.

CLEAN AIR ACT PROVISIONS

3. The Clean Air Act authorizes the United States Environmental Protection Agency (hereinafter EPA) to establish emission standards for hazardous air pollutants. An air pollutant is hazardous if, in the judgement of the Administrator of EPA, it causes or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality, or an increase in serious irreversible or

incapacitating reversible illness. Title 42, United States Code, Section 7412(a)(1).

4. The Clean Air Act banned the emission of any hazardous air pollutant in violation of any emission standard set by EPA. Title 42, United States Code, Section 7412(c)(1)(B), (e).

5. Asbestos is a hazardous air pollutant. 40 C.F.R. Section 61.01(a). Title 42, United States Code, Section 7412(a)(1).

6. Where the Administrator determines it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant, the Administrator may promulgate a design, equipment, work practice or operational standard, or a combination thereof, which in the Administrator's judgment is adequate to protect the public health with an ample margin of safety. Any such design, equipment, work practice or operational standard shall be treated as an emission standard. Title 42, United States Code, Section 7412(e)(5). In conformity with the Clean Air Act, the EPA established emission standards for asbestos in the form of work practice standards. 40 C.F.R. Section 61.140 through 61.156.

7. The emission of asbestos, a hazardous air pollutant, from any stationary source is prohibited. A stationary source is any building or structure which emits or may emit a hazardous air pollutant such as asbestos. 40 C.F.R. Section 61.02.

8. The demolition operation conducted by defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, is a stationary source under the Clean Air Act and CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, is an operator of that stationary source. Title 42, United States Code, Section 7411(a)(3) and (a)(5), 40 C.F.R. Section 61.02.

9. The work practice or operational standards applicable to each owner or operator of a demolition operation involving the requisite amount of friable asbestos material require notification as follows:

(a) Each owner or operator shall provide the Administrator with written notice of intention to demolish or renovate;

(b) Provide such notice at least ten days before the demolition operation is began;

(c) Identify the name and address of the owner or operator;

(d) List the scheduled starting and completion dates of demolition;

(e) State the nature of the planned demolition and the methods to be used;

(f) State the procedures to be used to comply with the safety requirements and work practice requirements of the regulations;

(g) Estimate the approximate amount of friable asbestos material present in the facility in terms of linear feet of pipe and the surface area on other facility components of friable asbestos material: and

(h) List the waste disposal site where the friable asbestos waste material will be deposited. 40 C.F.R. Section 61.146.

10. Additional work practice requirements for the prevention of emissions of asbestos-containing materials to the outside air mandate:

(a) That friable asbestos materials be removed from the facility being demolished before any wrecking or dismantling that would break up the asbestos materials or preclude access to the asbestos materials for subsequent removal; or

(b) That any friable asbestos materials are adequately wetted when they are being stripped from the facility;

(c) That friable asbestos materials that have been removed or stripped from the building are adequately wetted in order to ensure that they remain wet until collected for proper disposal;

(d) Make certain that friable materials that have been removed or stripped be carefully lowered to the ground and not dropped or thrown to the ground or a lower floor: and

(e) That all asbestos-containing waste material is properly deposited at waste disposal sites operated in accordance with EPA regulations.

Title 42, United States Code, Section 7412. 40 C.F.R. 61.141, et seq.

11. Each state may develop and submit to the EPA Administrator the procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in the state. If the Administrator finds the state procedure is adequate, he shall delegate to such state any authority he has under this chapter to implement and enforce such standards. Title 42, United States Code, Section 7412(d)(1). Nothing in this subsection shall prohibit the EPA Administrator from enforcing any applicable emission standard under this section. Title 42, United States Code, Section 7412(d)(2). Kentucky has been delegated such authority and the Jefferson County Air Pollution Control District has concurrent authority with Kentucky under C.F.R. 77. The Jefferson County Air Pollution Control District (hereinafter APCD) has promulgated regulations identical to 40 C.F.R. Section 140 through 156 under Regulation 5.04, Emission standard for asbestos.

CERCLA ("SUPERFUND")

12. The Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), also known as "Superfund" addresses the release and threatened releases of hazardous substances. Title 42, United States Code, Section 9601, et. seq. Asbestos is a hazardous substance under CERCLA. Title 42, United States Code, Section 9601(14). 40 C.F.R. Part 302.

13. Under CERCLA, any person in charge of a facility from which more than one pound of asbestos is released into the environment, without federal permit, must immediately report, and cause the report of this release to the appropriate agency of the United States Government, as soon as he has knowledge of said release. Title 42, United States Code, Section 9603(a) and (b). Title 42, United States Code, Section 9602. 40 C.F.R. Section 302.

14. A facility includes any building. Title 42, United States Code, Section 9601(9). 40 C.F.R. Section 302.

15. A release into the environment includes any emitting, escaping or disposing into the environment including dumping, discarding and abandoning. Title 42, United States Code, Section. 9601(22), (29). Title 42, United States Code, Section 9603. Title 42, United States Code, Section 9602. 40 C.F.R. Section 302.

CONDUCT OF THE DEMOLITION AND WRECKING OPERATION

16. On or about November 26, 1986, the defendant, Charles A. DONAHOO, JR., D/B/A CHARLIE WRECKING, did enter into a contract to wreck the building "call Reynolds at corner of 12th & Garlad."

17. On or about January 7, 1987, Robert S. Sterritt, owner of Tuscarora Plastics, did authorize CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, to secure a wrecking permit to wreck the structure on the property located at 831 South Twelfth. The applicant's signature was CHARLES A. DONAHOO, JR.

18. On January 22, 1987, Jack Baldwin, Inspector, Jefferson County Air Pollution Control District, inspected the demolition site at 831 South Twelfth Street. Portions of the upper floors had been demolished and had fallen, causing insulation to be knocked from pipes in the building. Insulation had fallen and was lying under pipes. There was exposure to the outside air of asbestos and deterioration of the building from the wrecking. Samples were taken of materials that scientifically tested to be asbestos containing materials.

19. Inspector Baldwin advised defendant CHARLES DONAHOO, JR., D/B/A CHARLIE WRECKING that asbestos was believed to be present in the building and that defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, must stop work. Baldwin advised defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, of the notification and work practice requirements of APCD Regulation 5.04 - Emission Standard For Asbestos.

20. On January 22, 1987, the City of Louisville, Department of Building Inspection, at APCD Inspector Baldwin's request, posted a stop work order on the premises at 831 South Twelfth for "failure to comply with air pollution standards." The notice stated "You are hereby ordered to immediately stop all wrecking work at the above-named property until these violations have been corrected."

21. As of January 22, 1987, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING had failed to provide any written notification of intention to demolish or renovate to APCD. Defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, had failed to provide notice of such demolition at least ten days before it was begun. CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, further failed to list the scheduled starting and completion date of the demolition, to state the nature of the planned demolition and the methods to be used. Further, DONAHOO did fail to estimate the approximate amount of friable asbestos containing material present in the facility in terms of linear feet on pipes and square footage of friable asbestos-containing material on other facility components. Further, DONAHOO had failed to state the name and location of the waste disposal site where the friable asbestos-containing waste material would be deposited.

22. On January 26, 1987, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, visited the APCD offices at 914 East Broadway, Louisville, Kentucky, requested asbestos removal requirements, asked about potential contractors certified to remove asbestos and received a copy of the EPA publication "Guidelines for Controlling Asbestos-Containing Materials in Buildings."

23. On February 11, 1987, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, again visited the APCD offices at 914 East Broadway, Louisville, Kentucky, and received a form entitled Asbestos Removal Notification. CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, also received a listing of current approved asbestos removal contractors.

24. On February 17, 1987, APCD sent, by certified mail, to defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, Violation Notice No. 87-0012 for violations observed January 22, 1987. The notice read, in pertinent part, "any removal site shall be sealed in a manner to prevent asbestos ambient air contamination. Load supporting structures were being demolished in a building at 831 South Twelfth Street without required prior notification; and without required use of procedures for asbestos emission control.

25. On February 19, 1987, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, visited the APCD offices at 914 East Broadway, Louisville, Kentucky, and presented an Asbestos Removal Notification form dated February 17, 1987. The notification form submitted by defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, listed the scheduled starting date for asbestos removal of February 22, 1987, and a scheduled completion date for asbestos removal of February 23, 1987. The defendant, CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, estimated the amount of friable asbestos material to be removed at "370 feet on a pipe and a tank." The defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, advised APCD personnel that he would prepare a plan for removal and bring it to the APCD office on February 20, 1987.

26. On the morning of February 20, 1987, APCD Inspector Jack Baldwin visited the demolition site at 831 South Twelfth Street and discovered that the previously identified asbestos-containing material had been removed from pipes and other plastic surfaces. The asbestos-containing material had been placed in open plastic bags. There was no indication of adequate wetting or other customary containing procedures required by law. Samples were taken of materials that scientifically tested as asbestos-containing materials.

27. On the afternoon of February 20, 1987, defendant CHARLES

A. DONAHOO, JR., D/B/A CHARLIE WRECKING, arrived at the offices of the APCD at 914 East Broadway, Louisville, Kentucky. Mr. DONAHOO at that time presented his removal plan by letter dated February 20, 1987

28. On February 27, 1987, the APCD sent violation notices

No.87-0015 and 87-0016 to CHARLES A. DONAHOO, JR., D/B/A CHARLIE

WRECKING, for violations observed February 20, 1987. Violation Notice No. 87-0015 stated, in pertinent part, "friable asbestos material had been removed from a building under demolition at 831 South Twelfth Street without required prior notification and without required use of procedures for asbestos emission control. Violation Notice No. 87-0016, in pertinent part "wrecking of load

bearing structural members and stripping of friable asbestos material had taken place at 831 South Twelfth Street without the required permit having been issued by the district.

The Grand Jury charges:

COUNT 1

1. Each of the allegations contained in paragraphs 1 through 28 of this Indictment is realleged and incorporated herein by reference as though fully set forth at length verbatim.

2. On or about and between January 9, 1987 and January 22, 1987, the exact dates being unknown to members of the Grand Jury, in the Western District of Kentucky at Louisville, Jefferson County, Kentucky, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, operator of a stationary source in Louisville, Kentucky, containing at least 260 linear feet of friable asbestos material on pipes or 160 square feet on other facility components, did knowingly demolish and cause to be demolished this stationary source in violation of any of the emission, design, equipment, work practice or operational standards for asbestos and knowingly caused asbestos to be emitted from this stationary source in violation of these standards.

In violation of Title 42, United States Code, Section 7412© and (e) and Title 42, United States Code, Section 7413(c).

The Grand Jury further charges:

COUNT 2

1. Each of the allegations contained in paragraphs 1 through 28 of this Indictment is realleged and incorporated herein by reference as though fully set forth at length verbatim.

2. From on or about and between January 7, 1987 and January 22, 1987, the exact dates being unknown to members of the Grand Jury, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, did, being a person in charge of a facility from which a reportable quantity of a hazardous substance, asbestos, is released without a permit did fail to immediately notify the appropriate agency of the United States Government of the release of the hazardous substance as soon as he had knowledge of such release at 831 South Twelfth Street, Louisville, Kentucky.

In violation of Title 42, United States Code, Section 9603(b).

The Grand Jury further charges:

COUNT 3

1. Each of the allegations contained in paragraphs 1 through 28 of this Indictment is realleged and incorporated herein by reference as though fully set forth at length verbatim.

2. On or about and between February 17, 1987 through February 20, 1987, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, did, in the Western District of Kentucky at Louisville, Jefferson County, Kentucky, on a matter within the jurisdiction of an agency of the United States, knowingly and willfully make or use any false writing or document, knowing the same to contain a false, fictitious or fraudulent statement, as he did submit Asbestos Removal Notification Form to APCD, 914 East Broadway, Louisville, Kentucky, stating the scheduled starting date for asbestos removal notification to be February 22, 1987, and a scheduled completion date for asbestos removal to be February 23, 1987, when the defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, did know that asbestos removal work had been started again on a date between January 22, 1987 and February 20, 1987.

In violation of Title 18, United States Code, Section 1001.

The Grand Jury further charges:

COUNT 4

1. Each of the allegations contained in paragraphs 1 through 28 of this Indictment is realleged and incorporated herein by reference as though fully set forth at length verbatim.

2. On or about and between January 22, 1987 and February 20, 1987, the exact dates being unknown to members of the Grand Jury, in the Western District of Kentucky at Louisville, Jefferson County, Kentucky, defendant CHARLES A. DONAHOO, JR., D/B/A CHARLIE WRECKING, operator of a stationary source in Louisville, Kentucky, containing at least 260 linear feet of friable asbestos material on pipes or 160 square feet on other facility components, did knowingly demolish and cause to be demolished this stationary source in violation of any of the emission, design, equipment, work practice or operational standards for asbestos and knowingly caused asbestos to be emitted from this stationary source in violation of these standards.

In violation of Title 42, United States Code, Section 7412 © and (e), and Title 42, United States Code, Section 7413(c).

The Grand Jury further charges:

COUNT 5

1. Each of the allegations contained in paragraphs 1 through 28 of this Indictment is realleged and incorporated herein by reference as though fully set forth at length verbatim.

2. From on or about and between January 22, 1987 and February 20, 1987, the exact dates being unknown to members of the Grand Jury, defendant CHARLES A. DONAHOO, JR., D/8/A CHARLIE WRECKING, did, being a person in charge of a facility from which a reportable quantity of a hazardous substance, asbestos, is released ,without a permit did fail to immediately notify the appropriate agency of the United States Government of the release of the hazardous substance as soon as he had knowledge of such release at 831 South Twelfth Street, Louisville, Kentucky.

In violation of Title 42, United States Code, Section 9603(b).

A TRUE BILL

B.D. Daniel Jr (Signature)

FOREMAN

A. Schultz (for)

JOSEPH M. WHITTLE

UNITED STATES ATTORNEY

FOOTNOTES

1.A draft CERCLA Section 103 penalty policy currently exists. Regions should apply that policy when it becomes final (to be issued as OSWER Dir. No. 9841.2).

2.The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) similarly demands that a release of a reportable quantity of an "extremely hazardous substance" or CERCLA "hazardous substance" be reported to the local Emergency Planning Committee and the State Emergency Response Commission for the area likely to be affected by the release. 42 U.S.C. § 11004. In contrast to the CERCLA Section 103(a) reporting requirements, which apply to any facility, the EPCRA Section 304 conditions apply solely to a facility that "produces," "uses" or "stores" hazardous substances or chemicals. Thus, asbestos demolition or renovation operations are not universally subject to Section 304 reporting requirements. Cases may exist, however, where it is appropriate to allege both EPCRA and CERCLA counts.

3.CERCLA also authorizes criminal sanctions for the failure to report the release of hazardous substances. 42 U.S.C. §9603(b). While the elements of a Section 103(b) claim are substantially the same as a Section 103(a) claim, the United States' burden of proof would be higher in a Section 103(b) criminal prosecution. Because the Air Enforcement Division docket consists of civil referrals, this memorandum discusses exclusively Section 103(a)(civil) liability. Regions are nevertheless reminded of the availability of including Section. 103(b) counts in criminal asbestos NESHAP cases filed under Section 113© of the Clean Air Act.

4.The preamble to the CERCLA reportable quantity regulations only states that the term "person in charge" is defined on a case specific basis, depending on the specific operation involved and other considerations. 50 Fed. Reg. at 13460.